MARTHA J. JILLSON

IBLA 71-130 Decided June 8, 1972

Appeal from decision by Alaska state office, Bureau of Land Management, rejecting trade and manufacturing site purchase application F-034585 in part.

Affirmed as modified.

Administrative Practice -- Administrative Procedure: Adjudication -- Alaska: Trade and Manufacturing Sites

A report of a field examination, although a proper basis for charges, notice, and a hearing, is not, by itself, without a hearing, to be used as evidence for rejecting a trade and manufacturing site purchase application in part. The Bureau of Land Management should bring a contest to reject such an application in whole or in part if the applicant has shown prima facie compliance with the law.

Alaska: Trade and Manufacturing Sites

There is no necessity for ordering a hearing on the appeal from a partial rejection of a trade and manufacturing site purchase application, where the appellant fails to allege facts which, if proved, would entitle her to favorable consideration of the rejected acreage.

APPEARANCES: Martha J. Jillson, pro se.

OPINION BY MRS. THOMPSON

This appeal by Mrs. Jillson is from that portion of the Alaska state office, Bureau of Land Management, decision of November 9, 1970, which rejected her application to purchase a 40-acre trade and manufacturing site as to 20 acres for lack of any improvements on them. The decision approved the application as to the other 20 acres.

Appellant's purchase application was filed May 3, 1970, for surveyed land described as NW 1/4 NE 1/4 SW 1/4, NE 1/4 NW 1/4 SW 1/4, SW 1/4 SE 1/4 NW 1/4, and SE 1/4 SW 1/4 NW 1/4, sec. 20, T. 3 S., R. 7 W., Fairbanks Mer., Alaska. The land office's rejection of the application as to the southern two subdivisions, i.e., the

NE 1/4 NW 1/4 SW 1/4 and the NW 1/4 NE 1/4 SW 1/4, was based on a field report of an examination of the tract that no improvements had been placed on them. It concluded the requirements of section 10 of the Act of May 14, 1898, 43 U.S.C. § 687a (1970), and the regulation, 43 CFR 2562.3(d)(1), were not met as to those 20 acres.

The Act referred to provides for the sale of not exceeding 80 acres of public land in Alaska to:

> Any citizen of the United States * * * in the possession of and occupying public lands * * * in good faith for the purposes of trade, manufacture, or other productive industry * * * upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry. * * *

Before considering appellant's contentions expressing her desire for the entire 40-acre tract, we shall clarify what the proper procedure by the Bureau should be in a case of this nature. Where a purchase application for a trade and manufacturing site and supplemental showings show prima facie compliance with the law, the application should not be rejected either in whole or in part by a land office decision relying on a report of a field investigation of the site as contradicting the asserted facts. A report of a field examination is a proper basis for bringing charges, notice, and a hearing, but should not serve alone as the evidentiary basis for a final action of cancellation in the absence of a hearing being afforded. Claude E. Crumb, 62 I.D. 99 (1955). Although the Crumb case applied to desert land entries, the rationale of this rule is equally applicable to purchase applications for trade and manufacturing sites. Don E. Jonz, 5 IBLA 204 (1972). Cf. Clayton E. Racca, 72 I.D. 239 (1965), and Lloyd Schade, A-30850 (December 14, 1967). The Racca and Schade cases both held that a hearing was necessary to determine the exact areas improved and necessary for the business operation on a trade and manufacturing site claim before the claim would be rejected in part where the applicant alleged improvement and use of all the land.

Therefore, when the Bureau believes through its investigation of a trade and manufacturing site that there is insufficient compliance with the law to warrant acceptance of a purchase application either in whole or in part, it should initiate a contest proceeding giving notice of the reasons for the rejection of the application in whole or in part and of the right of the applicant to a hearing if he disputes the facts upon which the charges of insufficient compliance or noncompliance with the law are based.

The Bureau did not follow this procedure in this case, however, its decision did afford notice of the grounds for the partial rejection of the application. The question now raised is whether a hearing must be ordered in this case. Clearly from the cases above cited, if the appellant disputed the factual basis for the rejection, she would be entitled to a hearing. A hearing, will not be granted, however, if there is no factual dispute, for it would be a meaningless gesture which is not necessary. See United States v. Consolidated Mines and Smelting Co., Ltd., 455 F.2d 432, 453 (9th Cir. 1971). Where, therefore, an applicant for a trade and manufacturing site fails to allege facts, which, if proved, would entitle him to a favorable consideration, there is no right to a hearing. Hershel E. Crutchfield, A-30876 (September 30, 1968).

In the present case, appellant has not denied the assertion concerning the lack of improvements on the area excluded from her application. At most, her statements on appeal go to her desire for the entire tract for future expansion of her business activities. She states she "feels" a need for the full 40 acres, and requests:

> If there is some way I could go ahead and be granted the approved 20 acres and still have further time to prove up on the other 20 acres I would be satisfied.

She points out that her site has already been reduced in acreage by rights-of-way for utilities and a highway traversing the site. She also contends part of the land she has been granted will not be immediately usable because of its swampy character so there isn't land "enough to build much of a business on." She states:

> This site is located on both sides of the Fairbanks-Nenana Hi-way. Seven miles from Nenana. My house and present business is on the north side of hi-way and just this summer was able to have clearing done on the other side preparing to build over-nite cabins.
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> I hope to have full-scale roadhouse in operation in the near future. That is over-nite cabins, restaurant, etc., plus complete garage and service station services I have at present.

All of the improvements referred to by appellant, including the clearings for the building of cabins, etc., and her present business activities appear to be well within the area for which her application was approved. She has not pointed to any use, occupancy or improvement of the rejected area. Because the Act of April 29, 1950, 43 U.S.C. § 687a-1 (1970), requires a trade and manufacturing site purchase

application to be filed within five years after a notice of claim is filed, there is no authority for extending the appellant's time to construct the improvements or developing her business activities within the rejected area. Don E. Jonz, supra. Accordingly, her rights to the tract must be based upon the facts at the time her purchase application was filed. As stated in regulation 43 CFR 2562.3(d) (1972), "* * * A site for a prospective business cannot be acquired under section 10 of the Act of May 14, 1898 * * *."

Even though the Bureau's action was not in accordance with the procedure which should have been followed, as appellant has had notice of the reasons for the partial rejection and has been afforded the opportunity by this appeal to dispute the facts relied on by the Bureau, we believe the Bureau's error is harmless and not prejudicial to appellant's rights.

In the absence of allegations by appellant of facts, which, if proved, would entitle her to favorable consideration of the rejected 20 acres, there is no necessity for a hearing in this case. Her statements regarding the location of her improvements and present business activities support the finding in the land office decision and afford an evidentiary basis for sustaining that decision. The decision is modified to reflect this and the foregoing discussion.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the decision appealed from is affirmed as modified by this decision.

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Joan B. Thompson, Member

We concur:

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Martin Ritvo, Member

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Douglas E. Henriques, Member